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File No. C. Constitution/52 Pt. II

Legal Department

A **BRANCH**

Subject:— Opinions under the Constitution of India

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Question as to what course should be adopted to set aside the election already held up as there is no Provision in the act whereby Govt. can declare any election void. Art. 15 (1) of the Constitution.

		Question as to what course should be adopted to set aside the election already held as there is no provision in the Act whereby Govt. can declare any election void. Art. 15(1) of the Constitution.
20.	R.I.No.20331/28-8-52 O.No.16069/29-9-52.	Re: Intestate Property Disposal of - (Pl.see R.L.A's No.3205 dated 9-4-41)
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22.	O.No.13906/26-8-52.	Re: Jurisdiction of a State in respect of territorial waters application of the Bombay Prohibition Act, 1949 to private merchant vessels of foreign States while they are in the territorial waters of the Bombay State Exemption from the operation of the Act under the convention. Article 253 of the Constitution.
23.	R.I.No.22442/24-9-52.	Re: Copy of letter No.Co/II/SR/34/147 dt.23-7-52 from the Director of Backward class Welfare regarding classification of sub-divisions of communities recognised as backward.
24.	R.I.No.10012/20-5-52. O.No.16096/29-9-52.	Question whether the passage concessions admissible to a High Court Judge who is a member of the Indian Civil Service under paragraph 16 of the Govt. of India (High Court Judges) Order, 1937, prior to the commencement of the constitution, survive after the commencement thereof.
25.	R.I.No.23737/11-10-52 O.No.17542/23-10-52.	Re: Award of open scholarships and freeships to students belonging to backward classeswhose families are ordinarily resident in the State of Bombay. Question whether such rule which requires the candidates to have a permanent home in this State requires to be amended Art. 15(4) of the Constitution (Pl. see R.L.A's No.14235/30-8-52).
26.	O.No.11278/8-7-52.	Question whether consistent with the provisions of the Constitution, it would be possible to refuse admission in a hospital in the State of Bombay to patients who came from outside the State of Bombay. Art. 15 and 16 of the Constitution.

27. R.I.No.11922/17-6-52 O.No.17388/21-10-52.	Question whether the condition of State domicile for admission to the educational institutions under the control of the Department of technical Education be continued or done away with. Art.15(1) and 29(2) of the Constitution (Pl. see R.L.A's No.6696/29-4-52).

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ABL 11-4-56

Legal Department.

The statement made in the C.S.D. note at p. 10 ante that the Supply and Prices of Goods Act, 1950, was issued prior to the promulgation of the Constitution is not correct. The Act in question received the assent of the President on the 23rd December 1950 and was obviously made after the Constitution came into force. Since no notification under para 5 of the Fifth Schedule to the Constitution has been issued in respect thereof, it automatically applies to the Scheduled areas in this State and the question of its application to the said areas by a specific notification does not arise at all.

2. In para 3 of its note dated the 6th May 1952 (pp. 5-6) the C.S.D. has observed that the Acts mentioned in para 2 of the said note except the Supply and Prices of Goods Act, 1950, have been made specifically applicable to the partially excluded areas of the State of Bombay. From the notifications forwarded by the C.S.D. it does not appear that any notifications under section 92 of the Government of India Act, 1935, applying the Essential Supplies (Temporary Powers) (Amendment) Acts of 1948 and 1949 were issued. The C.S.D. may verify the facts from their records. From the information available in L.D. it does not appear that any notifications were issued.

Sd/- J.R.Dhurandhar.
19.6
Additional Secretary to Government.

U.R. to C.S.D., No. 10280, dated the 20th June 1952.

V.M.D./25.7
&c.

LEGAL DEPARTMENT.

In Government Resolution, P. & S.D., No. 490/45 dated the 1st November 1950, Government has published a list of the communities which are to be classified as Backward. The said classification was made for the purpose of reservation for appointments to Government services. Government Resolution, Education Department No. CBC. 1051 dated the 26th July 1951, provides that the said classification should not be restricted to reservation for recruitment to Government services, but should be extended to the grant of all concessions to backward classes. The Government resolution of 1950 makes it clear that the classification has been made in consequence of the provisions of article 16(2) and 16(4) of the Constitution. Clause (2) of article 16 provides that no citizen shall on the ground only of religion, race, caste, etc., be ineligible for, or discriminated against in respect of, any employment or office under the State. Clause (4) then provides that nothing in the article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The Constitution has referred to backward classes in articles 15(4) and 16(4), but has not defined the expression 'backward classes'. In article 16(4) it is for the State to decide which communities or classes shall be recognized as backward-classes. Unless any community or caste is declared to be a backward class, it cannot be entitled to the benefits of article 16(4). It is true that in article 15(4) as well as in article 335 express mention of Scheduled classes and tribes has been

been made. But so far as article 16(4) is concerned there is no such express mention and unless the Scheduled castes are included in the list of Backward Classes, it will not be possible to make them entitled to any reservation. It may be mentioned in this connection that article 335 empowers Government to take into consideration the claims of the members of Scheduled Castes and tribes in making appointments. But that article can be invoked in making individual appointments and does not relate to the reservation which can be made under article 16(4).

Sd/- J.R.Dhurandhar.

30.6
Additional Secretary to Government.
Legal Department.

V.M.D./25.7
40.

Office of the R.L.A.

It is understood from the L.S.G. & P.H.R. that the Topiwala National Medical College, Bombay, is run by the Bombay Municipal Corporation. If so, in view of the provisions of Article 12 of the Constitution the expression "the State" in Article 14 would include all local authorities. Consequently R.L.A's opinion No. 6553 dated the 24th April 1951 given in respect of the reservation of seats in Government medical colleges would also apply to the reservation of seats in medical colleges conducted by the Bombay Municipality. Reservation of two seats in the Topiwala National Medical College for the sons and daughters of the members of the staff would, therefore, offend against Article 14 of the Constitution.

2. The R.L.A. would suggest that this question and the question in the linked case of awarding stipends etc. to the children of teachers may once more all be considered in a conference with a view to evolving a policy which may satisfy the Honorary Professors in the Medical Colleges and teachers in other Government institutions and which at the same time would not be held to be in contravention of the fundamental rights guaranteed in the Constitution.

Sd/- P.H.Lad.
16.6
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D. No. 10349, dated 16th June 1952.

V.M.D./25.7
40.

LEGAL DEPARTMENT.

The question whether any particular office is an office of profit or not will have to be decided having regard to the facts of each particular case. If, therefore, as stated by the Collector, the members of the various committees referred to in his letter do not receive any salary, remuneration or honorarium except the travelling allowance, then the view expressed by the Collector that they cannot be said to hold an office of profit is correct. The averment made in the proposed draft letter that according to section 2(e) of the Parliament Prevention of Disqualification Act, 1951, all members of the Committees appointed by Government whether they h hold office of profit or not incur disqualification after 31st March 1952, for being continued as members of Parliament is therefore not correct. A revised draft letter in place of the draft letter at page 7(correspondence section) is sent herewith.

Sd/- J.R.Dhurandhar.
7.7
Additional Secretary to Government.

U.R. to A & F.D. No. 11298, dated the 8th July 1952.

V.M.D./25.7
40.

NO.

To

The Collector of Nasik.

Bombay, July 1952.

Reference your letter No. A.D.M. 652, dated 16.4.52.

2. A person is said to hold an office of profit under Government if he is paid any salary, remuneration or even honoraria by Government. Mere payment of travelling or daily allowance to a member of any Committee or body, appointed by Government will not disqualify him from continuing as a member either of Parliament or the State Legislature provided such payment is made for the purpose of reimbursing the personal expenditure incurred by such member in attending the meeting of the Committee or body or performing any other function inrespect thereof. If, therefore, the members of the various committees referred to in your letter under reply are not paid any salary, remuneration or honoraria they cannot be said to hold an office of profit under the Government. Consequently the members of the said committees will not be disqualified for being members of the Parliament or the State Legislature as the case may be.

Yours faithfully,

Secretary to Government.

V.M.D./25.7
40.

OFFICE OF THE R.L.A.

The main basis for the view expressed by the R.L.A. in his opinion No. 113-Confl., dated 3rd March 1943, appears to be that a person officiating in a higher post holds no lien on the post and has therefore no right to continue to officiate in that post. Such a person can be reverted from the post in which he is officiating at any time for any reason whatsoever. That would not amount to reduction. The Judges of the Nagpur High Court in the case seem to be of the view that if a person is removed from the higher post that would amount to reduction inasmuch as this fact is bound to come in the way of his future prospects. The Nagpur High Court's decision has not yet been reported. The question raised is of importance and it would be hazardous to express a view without looking into the full report of the case. The R.D. is requested to ask the petitioner to forward a full copy of the judgment.

Sd/- P.M.Lad.
19.1.52.
Remembrancer of Legal Affairs.

U.R. to R.D. No. 561, dated the 19th January 1952.

V.H.D./25.7
Lo.

Office of the R.L.A.

R.L.A's opinion No. 113-Confl., dated 3rd March 1943, to which reference has been made by Revenue Department, was given with reference to rule 49 of the Civil Services (Classification, Control and Appeal) Rules. That rule provided among others a penalty to be imposed upon members of certain services, namely, reduction to a lower post or time-scale or a lower stage in a time-scale. The Civil Services (Classification, Control and Appeal) Rules were made under section 96B of the old Government of India Act. Sub-section (2) of that section gave power to the Secretary of State in Council to make rules for regulating the classification of the civil services in India, the methods of their recruitment their conditions of service, pay and allowances and discipline and conduct. Rule 49 referred to above derives authority from sub-section (2) of section 96B. The old Government of India Act was repealed by the Government of India Act, 1935. Section 240 of the Act of 1935 reproduced to a certain extent the provisions of section 96B of the ~~said~~ old Government of India Act. But it went further and contained a mandatory provision which was absent from the old Government of India Act. That provision was that no person who was a member of civil service under the Crown in India or held any civil post under the Crown in India should be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. When the Government of India Act, 1935, came into force, it was necessary to consider before any Crown servant was dismissed or reduced in rank whether he had been given a reasonable opportunity of showing cause, for sub-section (3) of section 240 qualified the right of the Crown recognised in sub-section (1) of section 240. Sub-section (3) of section 240 was obviously enacted to safeguard the rights of a Government servant; it gave him a constitutional guarantee of

being heard before dismissal or reduction in rank. It has been repeatedly laid down by the Privy Council that in interpreting a constituent or organic statute such as the Act (the British North America Act) that construction most beneficial to the widest possible amplitude of its powers must be adopted (55 C.L.R. 1 (P.C). at p. 43). Applying this principle to the interpretation of sub-section (3) of section 240, it will be necessary to interpret the word "rank" in that sub-section as also including the rank which the Government servant concerned occupies temporarily. To reduce means to bring down to a lower rank or position, dignity, etc. Murray's New English Dictionary, Vol. 8. If, therefore, an officer is by way of penalty brought down to a lower rank from the rank he may be occupying for the time being, whether permanent or temporary, he would be deemed as ab being reduced in rank within the meaning of sub-section (3) of section 240 of the Government of India Act, 1935. (See also the judgment of the U.P. High Court in the case of Jayanti Prasad v. State of Uttar Pradesh (1951 A.L.J. 450). This aspect of the case was not considered by the A.L.A. in his opinion of 1943 referred to above. Clause (2) of article 311 of the Constitution of India is similar in wording to sub-section (3) of section 240 of the Government of India Act, 1935. The result, therefore, is that if a Government servant officiating in a higher post is reverted to his original post by way of penalty, the reversion will amount to reduction in rank within the meaning of clause (2) of article 311 of the Constitution; and, therefore, before such reversion is made, it will be necessary to give the Government servant concerned an opportunity of being heard as required by the said clause (2) of article 311. The view taken by the Nagpur High Court is, therefore, correct.

Sd/- P.M.Lad.
26.6
Remembrancer of Legal Affairs.

V.M.D./25.7

U.O. to M.D., No. 612-Confl., dated the 28th June 1952.

Office of the R.L.A.

CONFIDENTIAL.

Clause (2)(b) of article 217 of the Constitution provides that a person shall not be qualified for appointment as a Judge of a High Court unless, inter alia, he has for at least 10 years been an Advocate of a High Court in any State specified in the First Schedule or of two or more such Courts in succession. The expression "Advocate of a High Court" has not been defined in the Constitution nor in the General Clauses Act which applies to the interpretation of the Constitution. However, the plain meaning meaning of that expression is that the person concerned must be entitled to practise as an Advocate in the High Court. "Advocate" is defined in the Indian Bar Councils Act, 1926, to mean an Advocate entered in the roll of a High Court under the provisions of that Act. Section 8 of that Act provides that no person shall be entitled as of right to practise in any High Court unless his name is entered in the roll of Advocates of the High Court maintained under the Act. It follows, therefore, only such Advocated as are entered in the roll of Advocates of the High Court maintained under the Indian Bar Councils Act would be eligible provided they have the requisite standing as such Advocates for 10 years. It is immaterial where such Advocates actually practise, whether in the High Court proper or in the mofussil Courts, for it is well known that persons who are entered in the roll of Advocates maintained by the High Court sometimes practise in the District and other Courts also. It must, however, be made clear that all those lawyers who practise in the mofussil Courts and who have not been on the roll of Advocates maintained by the High Court for 10 years will not be eligible.

Sd/- P.M.Lad.
30.7
Remembrancer of Legal Affairs.

U.R. to H.D. No. 733-Confl., dated the 30th July 1952.

V.H.D./25.7

Office of the R.L.A.

It appears to have been assumed by the Attache (Permits) in his letter at page 5 ante that Mrs. Safia Begum will be entitled to settle in India as an Indian Citizen at present. This assumption is not correct. The law regarding Indian citizenship is contained in Articles 5 to 8 of the Indian Constitution and the nationality of Mrs. Safia Begum Zubair will have to be determined in accordance with the provisions contained in these Articles. According to her own admission, Mrs. Zubair has retained her Pakistani nationality. It is true that she has married an Indian; but marriage alone is not sufficient to confer Indian nationality on her. Considering her case in reference to Articles 5 to 8 of the Constitution, it must be observed that her case does not fall under Articles 6, 7 or 8. Being born at Lahore, she does not satisfy clause (a) of Article 5 nor does she satisfy clause (c) of that Article as she has not resided in India for not less than five years immediately preceding the commencement of the Constitution. It is, however, not known where her parents were born and it is not, therefore, possible to fix her nationality with reference clause (b) of Article 5. The Rehabilitation Department may, therefore, ascertain the necessary information and see whether Indian nationality is conferred on her by virtue of this clause.

2. If Mrs. Zubair is not entitled to Indian Nationality under clause (b) of article 5, she will have to be treated as a Pakistani national and will be subject to the same disabilities and obligations as any other citizen of Pakistan. Whether in spite of this fact some special privileges should or can be given to her is a question which is for the administrative department to decide. The Rehabilitation Dept. may consider the question in the light of the relevant provisions of the law.

R. L. A.

U.R. To M. D. No 13210 11-8-52

Office of the R.L.A.

The reservation as proposed appears to be free from any constitutional difficulty as it is relatable to a principle other than that of religion, race, caste, sex, place of birth or any of them. Such reservation will not, therefore, be in contravention of article 15 of the Constitution. The reservation is not made arbitrarily or capriciously but seems to proceed on the basis of reasonable classification. Poor students who are educated in smaller urban and non-urban places will generally require special monetary help to enable them to prosecute their studies in Colleges and Universities which are situated in bigger cities away from their homes; and therefore, this basis of reservation is relatable to the purpose of the scholarships. It will not, therefore, violate article 14 of the Constitution.

Sd/- P.M.Lad.
29.8.

Remembrancer of Legal Affairs.

U.R. to F.D., No. 14144, dated the 29-th August 1952.

V.M.D./25.7
4c.

Office of the R.L.A.

Para 2 of the Chairman's note, with which the revised scheme for the training of apprentices in the Bombay Port Trust Workshops was circulated, explains in short the object of the scheme. That para is as follows:-

"In drawing up the revised scheme the provisions of the scheme of apprentices in force on the Railways have been taken into consideration. The main difference between the Port Trust scheme and that on the Railways is that the object of training apprentices on the Railways is to train up workmen for ~~mmhh~~ employment in the Railway, whereas our object is merely to afford an opportunity to young men to receive the practical experience necessary to qualify themselves for a trade. Although apprentices on completion of their training are given preference for employment in the Port Trust, our workshop ~~mbbeing~~ comparatively very small, it is neither feasible nor expedient to guarantee employment to all apprentices as on the Railways."

Clause 14 of the scheme specifically provides that no guarantee of employment is given and all apprentices automatically cease to be under training on completion of the term of their apprenticeship. In fact, it seems that a large percentage of the apprentices is absorbed by Shipping Companies. The Port Trust absorbs only a small percentage; and even in respect of them it is further provided that if any vacancies for tradesmen exist apprentices with satisfactory attendance, conduct and application to work will be given employment at the discretion of the Mechanical Superintendent. It will thus be clear that all apprentices are not absorbed in the service ~~mm~~ of the Port Trust. It is true that a few of them may be employed in the Port Trust on completion of their training, but these few apprentices may also include outsiders. They are not necessarily sons and dependents

of Port Trust employees. That being so, clause (1) of article 16, which guarantees equality of opportunity to all citizens in matters relating to employment or appointment in office under the State is not violated; for, in the matter of employment or appointment apprentices who are the sons and dependents of the Port Trust employees do not get any better opportunity than other apprentices who have equally completed their training, and the appointments are expected to be made solely on the basis of merit. It is true that preference is shown, as stated by the Director of Technical Education, to the sons and dependents of Port Trust employees for admission to the apprentice scheme, and this preference may result in some discrimination. But such discrimination is not on grounds only of religion, race, caste, sex, place of birth or any of them and is not, therefore, hit by clause (1) of article 15. It is possible to hold that the Workshop of the Port Trust, in which apprentices are trained, is an educational institution maintained by the State within the meaning of clause (2) of article 29 read with the definition of State in article 12 of the Constitution. But that clause also cannot apply in the present case as no citizen who has been denied admission can contend that admission has been denied to him on grounds only of religion, race, caste, sex, place of birth or any of them. The apprentice scheme of the Bombay Port Trust does not appear to be in violation of any of the provisions of the Constitution.

Sd/- P.H.Lad.
S.S
Remembrancer of Legal Affairs.

U.R. to E.D. No. 13092, dated the 9th August 1952.

V.M.D./25.7
Lo.

Office of the R.L.A.

Section 21 of the Reserve Bank of India Act, 1934, inter alia provides that the State Governments shall entrust the Bank on such conditions as may be agreed upon with all their money, remittances, exchange and banking transactions in India and in particular shall deposit free of interest all their cash balances with the Bank. In pursuance of this provision the Government of Bombay have entered into an agreement dated the 28th July 1937. Under clauses 5 and 6 of the agreement read with the subsidiary agreement made under clause 5, the Bank has agreed to grant ways and means advances to Government to the maximum amount of 30 lakhs. According to the terms of the agreement, therefore, the Bank would be justified in refusing to grant the ways and means advances above the said maximum. Thus under the agreement all that the Bank has secured is a right to refuse ways and means advances above the said maximum. But there is nothing in the provision of the agreement nor in the provisions of section 21 or any other provision of the Act to indicate that the Bank is precluded from granting such advances in excess of the agreed maximum. On the other hand, it appears from the provisions of section 17(5) that the Bank is authorised to make to the State Government advances repayable in each case not later than 3 months from the date of the making of the advances. That being so, the grant of advances made by the Bank in excess of the said maximum was quite legally in order.

2. Loans can be given on a over-draft arrangement (Cf. page 160 of Paver's Law and Practice of Banking). It therefore, follows that the over-drafts constituted short term loans from the Bank. Article 293(3) of the Constitution provides that a State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has

been made to the State by the Government of India or in respect of which a guarantee has been given by the Government of India. It is presumed that there are still outstanding some part of the loan made by the Government of India. Consequently, it will be necessary to obtain the consent of the Government of India in the present case. The view expressed by the Finance Department is correct.

Sd/- V.M.Lad.
11.9
Remembrancer of Legal Affairs.

U.O. to F.D., No. 911/F-Conf., dated the 11th September 1952.

V.M.D./25.7

40.

Office of the R.L.A.

The legal position stated by the Political and Services Department in its office note dated the 31st July 1952 is correct. Shri Ramchandani's services have been terminated without giving him an opportunity to show cause as provided in article 311 of the Constitution of India and consequently the termination of his services would not be lawful. The proper course would be to cancel the order, to continue Shri Ramchandani under suspension, to hold a regular departmental enquiry and then to dismiss him from service. The payment of a month's salary as suggested by Secretary, Finance Department, would not solve the difficulty as the dismissal of Shri Ramchandani in the present case is for misconduct.

Sd/- P.N.Lal.
13.9
Remembrancer of Legal Affairs.

U.R. to P. & S.P., No. 930/A-Confl., dated the 16th September 1952.

V.M.D./25.7
4a.

Office of the H.L.A.

So far as the Panch Mahal District School Board is concerned, one seat has been reserved to Muslims which has been declared as a minority for the purposes of the Bombay Primary Education Act, 1947, under rule 3 of the Bombay Primary Education Rules,. Even before the Madras High Court in the case of City Council Elections had given its judgment that reservation of seats for Muslims, Indian Christians and Anglo Indians in the Council of the Corporation of Madras offended against article 15(1) of the Constitution, the Bombay Government had recognised that the provisions of sub-section (6) of section 4 of the Act were open to challenge. Steps were therefore taken to amend the said Act in the last session. In the meanwhile the election to the Panch Mahals District School Board has taken place on the basis of the old constitution prescribed for the Board. The question now is one of setting aside the election already held. Under section 6 of the Act, it is for the unsuccessful candidate or person qualified to vote at an election to challenge the election. There is no machinery under the Act whereby Government can declare any election void. Government, however, should, after taking into consideration the provisions of the Primary Education Bill passed by the Legislature in the last Session, take immediate steps to revise the existing rules whereunder seats have been reserved for Muslims and Indian Christians and to revise the constitution of the various school boards, if necessary so that all future elections may be held under the revised constitution.

Sd/- P.H.Lad.

Remembrancer of Legal Affairs.

U.R.to E.D. No. 104/E-Confl., dated the 10th October 1952.

V.M.D./26.7
40.

Office of the R.L.A.

Attention is invited to R.L.A's opinion No. 610-Confl. dated the 26th June 1952. (Copy enclosed). On the facts supplied by the Superintending Engineer, it is clear that if Shri Udeshi goes to a Court of Law he will have good chances of success. Shri Udeshi was appointed as a Deputy Engineer and even though he was a temporary servant he could not have been reduced in rank without being given an opportunity of being heard as provided in clause (2) of Article 311. It is further clear that his reversion was ordered by way of penalty on account of his unsatisfactory work. The Political and Services Department's contention that it was not by way of penalty is not correct. The view taken in R.L.A's above opinion is also supported by a recent decision of the Orissa High Court in Kashinath Patnaik v. P.K. Kayils, A.I.R. 1952, Orissa, 285.

Sd/- P.M.Lad.
26.9
Remembrancer of Legal Affairs.

U.R. to P.W.D.(through P. & S.D.) No. 924/A-Confl. dated the 27th September.

V.M.D./26.7
40.

Legal Department.

Under the International Law, the jurisdiction of a State extends to territorial waters and accordingly in his opinion dated the 21st October 1951, the Addl. Secy. has advised that the Bombay Prohibition Act, 1949, will apply to all private merchant vessels of foreign States while they are in the territorial waters of the Bombay State, though public vessels will be exempted from its operation under the well settled rule of International Law. Under the proposed Art. 23 of the Convention, however, all the vessels of the United States of America, whether public or private, visiting the ports of India will be exempt from Police jurisdiction except as regards matters specified therein. If this clause is agreed to all the American ships will be exempt from the operation of the Prohibition Act as well as other Laws while in the territorial waters and the Police will be unable to check breaches of law on board the U.S. ships. Government should not, therefore, agree to such exclusion of its jurisdiction in respect of private ships of other nations while in territorial waters.

2. The other stipulations proposed to be included in the convention are not unusual and appear to be in accord with stipulations found in treaties between States (Oppenheim on International Law, Vo. I, pp. 752-755). There would, therefore, be no objection to accept them, particularly when the exemptions and privileges proposed to be provided are reciprocal. The Administrative Department may, however, consider whether any privilege or exemption is likely to create administrative difficulties in future.

3. Under Article 253 of the Constitution, the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement, or convention with

er countries. On conclusion of the Convention Parliament would probably make a law for implementing it and when such a law is made by Parliament, it would automatically secure the exemptions granted to the Consular officer and his staff and separate amendments of the Acts would not be necessary. The question of amending Departmental Rules and Hah Manuals may be taken up later when the convention is implemented by an Act of Parliament under Article 253 of the Constitution .

Sd/- J.R. Dhurandhar.
21.8
Additional Secretary to Government.

U.R. to H.D. No. 13906, dated the 26th August 1952.

"V.M.D./26.7

4c.

Office of the R.L.A.

The question has to be considered mainly in the light of articles 221(2), 376, 372 and 314 of the Constitution. The general position in respect of High Court Judges' allowances, etc., is stated in article 221(2), which says that every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule. This provision applies to Judges appointed after the Constitution came into force. By reason of article 376, Judges of High Courts in the Provinces, who were given the election and who became on the commencement of the Constitution the Judges of the High Court in the corresponding State, become equally entitled to allowances and to such rights in respect of leave of absence and pension as are provided for under article 221 in respect of the Judges of such High Court. The result, therefore, is that both types of Judges - those who continued by virtue of article 376 and those who are appointed under article 221 - are entitled "to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule." The rights in this article are in terms confined to rights in respect of leave of absence and pension, so that no other kind of right can be imported therein. We are, therefore, concerned with allowances only. Parliament has not so far made any law. Therefore, the allowances to which both types of Judges are entitled are those specified in the Second Schedule. The Second Schedule specifies in clause (3) of paragraph 10

allowances to reimburse a Judge for expenses incurred in travelling on duty within the territory of India, and in clause (4) leave allowances which are included in the rights in respect of leave of absence. Whatever does not fall within the proper scope of these two kinds of allowances cannot be said to have been specified in the Second Schedule.

2. The first question for enquiry, therefore, is: Can passage benefits be ordinarily included in the allowances specified in the Second Schedule? The answer to that enquiry must be in the negative. It is quite clear that passage benefits are not connected with leave and can be enjoyed by persons others than the incumbent of the office, namely, his wife and children; nor can passage benefits be treated as reasonable allowances to reimburse a person for expenses incurred in travelling on duty.

The next question, therefore, is: Whether by reason of article 372 that part of the Government of India (High Court Judges) Order, 1937, which deals with passage benefits can be said to have been continued in force ? Here again the ans answer is in the negative. Even assuming that the Order comes within the description of the law in force in the territory of India, such law is continued in force subject to the other provisions of the Constitution. The words "subject to" mean mean in this context that other provisions of the Constitution, if they are clear in that behalf, override that law (cf. the observations of Patanjali Sastri C.J. in the case of Rajа Suriya Pal Singh v. The State of U.P. and Another and other cases). Since special provision has been expressly made regarding the salaries,pensions, allowances and rights of the High Court Judges in article 221 read with the Second Schedule, and since the Judges who were given the election are also made subject to these express provisions after they continued in office, it would not be permissible to hold that other provisions dealing with the High Court Judges' salaries, allowances and rights are also to be continued in force.

The usual maxim expressio unius est exclusio alterius will apply. That also follows from the fact that clause (4) of paragraph 19 of the Second Schedule adopts only certain provisions of the existing law. If the Constitution intended by article 372 to continue in force the Government of India (High Court Judges) Order, 1937, in its entirety, the provisions of clause (4) of paragraph 19 would become otiose. It follows, therefore, that the intention of the Constitution was to preserve as a transitional measure the Order only in those particulars which relate to the matters specified in clause (4) of paragraph 19. In short, whatever allowances, rights, etc., the High Court Judges are entitled to have must be sought within article 221 read with the Second Schedule and not by reliance upon article 372.

2. The third question is: whether article 314 can be availed of by the I.C.S. Judges who have continued or who may hereafter be appointed. The answer again is in the negative. Article 314 occurs in the Chapter "Services under the Union and the States" and by no stretch of imagination can the High Court Judges be held to be part of the Services under the Union or the States. That Chapter must be confined to services proper, i.e., to the civil services as popularly known. In that behalf it must be pointed out that even formerly a member of the I.C.S. who became a High Court Judge thereafter did not continue to enjoy these privileges as a member of the I.C.S. but was allowed to enjoy those privileges as a particular type of a High Court Judge for whom special provision was made in the Government of India (High Court Judges) Order, 1937. In other words, it is by virtue of the Order and not by virtue of the membership of the Indian Civil Service that he enjoyed those privileges, including, it may be pointed out, the passage benefits also.

In the result, therefore, it must be held that as the law stands to-day, the I.C.S.Judges are not entitled to the passage benefits.

4. It is, however, understood that the Ministry of Law has expressed the view that the word "allowances" refers not only to the allowances given to Ministers, but also the advantages given to them in lieu of allowances (see A.G's note dated 1.12.1950 sent to the F.D.). Assuming the correctness of that ruling, it will be permissible to make a law under the authority given to it by article 221 giving all the High Court Judges the benefits of medical attendance and also passage benefits to those who were formerly entitled to them. In accordance with that ruling, passage benefits can undoubtedly be treated as allowances and it will be competent to Parliament to make a law for these matters, as Parliament has done in respect of Ministers (see the Salaries and Allowances of Ministers Act, 1952).

5. It must, however, be confessed that it would be difficult to bring the provident fund benefits as part of "allowances" and, if the view taken in this opinion be accepted as correct law, it would seem difficult even for Parliament to make a provision under article 221 for provident fund benefits for High Court Judges. Whether such provision can be made by some other kind of enactment is a question on which it is unnecessary to express any opinion.

Sd/- P.K.Lad.
27.9

Remembrancer of Legal Affairs.

U.R. to F.D. No. 1600/3 dated the 29th September 1952.

V.M.P./26.7
4c.

Office of the P.L.A.

Since the use of the word 'home' would require the establishment of the facts of residence and the animus manendi, it would be desirable to use the expression "ordinarily resident" as suggested in P.L.A.'s opinion No. 1423) dated the 30th August 1952 at page 3 ante. The expression ordinarily resident' has been judicially interpreted and its use will not give rise to any complications; it may therefore be preferably used in the rule which refers to the candidate's "permanent home".

Sd/- P.V.Lad.
21.10
Remembrancer of Legal Affairs.

U.O. to S.E. No. 17542/A, dated the 23rd October 1952.

MV.M.D./26.7
40.

Office of the D.L.A.

The question for D.L.A's consideration is whether consistent with the provisions of the Constitution, it would be possible to refuse admission in a hospital in the State of Bombay to patients who come from outside the State of Bombay. The relevant article to be considered in this connection is article 15(1) of the Constitution which prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. This article does not, like article 16(2), prohibit discrimination based among other grounds, on ground of residence only. If, therefore, admission in the hospitals in the State is restricted to persons ordinarily resident in the State irrespective of the fact whether they are born in the State irrespective of restriction will not infringe the provisions of article 15(1) The words as put in inverted comma above may also be used verbatim in the order on the subject.

Sd/- [illegible]
7.7
Remembrancer of Legal Affairs.

U.O. to L.D.A. [illegible] No. 1[illegible]73, dated the 8th July 1952.

M.M.D./26.7
&c.

Office of the R.L.A.

Attention is invited to R.L.A's opinion No. 6696, dated the 29th April 1952. It was stated in the note of Under Secretary, Education Department, dated 12.6.1952 (p. 5) admission to the Scheme is restricted to students attending schools and colleges in the State or passing the particular examinations such restriction would not contravenes either Article 15(1) or Article 29(2) of the Constitution.

Sd/- P.M.Lad.

Remembrancer of Legal Affairs.

R.R. to E.D., No. 17308/B, dated the 21st October 1952.

V.N.D./26.7
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